NO. 55638-3-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Travis and Michelle Vogue,

Plaintiffs/Respondents,

v.

Patti Lou Gillum,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT PATTI GILLUM

On Appeal from the Superior Court of the State of Washington
for Pacific County
The Honorable Donald J. Richter

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A. Standard of Review

The parties' initial descriptions of the standard of review are in agreement. *See* Opening Brief of Appellant Patti Gillum ("OB") 4; Brief of Respondent ("BR") 10-11. The Vogues' discussion, however, then suggests the only question is whether substantial evidence supports the trial court's decision. BR 11-12. As discussed previously, in multiple respects the trial court abused its discretion through (1) application of the incorrect legal standard, (2) failure to consider a relevant factor, (3) entry of inconsistent findings, and (4) an ultimate determination that was manifestly unreasonable. *E.g.*, OB 4-5, 18-19, 23-25, 27-28, 30-31, 35-37. The trial court's errors included, but were not limited to, findings that were not supported by substantial evidence.

B. Ms. Gillum satisfied the first *Proctor/Arnold* factor.

1. Subsequent purchasers satisfy the first factor.

Riley v. Valaer correctly interpreted the first *Proctor/Arnold* factor. *Riley v. Valaer*, No. 52687-5-II, 2020

WL 1696672 at *5-7 (Wn. App. Apr. 7, 2020) (unpublished; cited pursuant to GR 14.1). It understood that factor to concern parties who build encroaching structures despite being warned they should not do so. *See id.* at *5-6 (citing, e.g., *Bach v. Sarich*, 74 Wn.2d 575, 581-82, 445 P.2d 648 (1968) (defendants "knowingly took a risk by continuing construction"); *Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941); *Mahon v. Haas*, 2 Wn. App. 560, 565, 468 P.2d 713 (1970) (plaintiff who built greenhouse after receiving warning letter from defendant's attorney "was either taking a calculated risk, or acting with indifference")). In contrast, "a later owner who had purchased a preexisting structure and had not participated in building the encroachment" would not fail the first factor. *Riley*, 2020 WL 1696672 at *5; *see also Proctor v. Huntington*, 169 Wn.2d 491, 496, 238 P.3d 1117 (2010) ("Encroachment occurs when one builds a structure on another's land."); *Arnold v. Melani*, 75 Wn.2d 143, 145, 152, 449 P.2d 800 (1968) (denying injunction against subsequent purchaser); *White Water Inv., LLC v. Cool*

Beans Eastlake, LLC, No. 71115-6-I, 2015 WL 1453458 at *5-6 (Wn. App. Mar. 23, 2015) (same) (unpublished; cited pursuant to GR 14.1).

Ms. Gillum's opening brief explained that she satisfied the first factor for two reasons. First, it is undisputed she did not locate the home, which had been in place for many years before she purchased it. OB 17; CP 12 ¶ 4. Second, there was simply no encroachment when she bought the home. Pursuant to her contemporaneous agreement to purchase lot 3 over time, she had "the right to possession of the land, the right to dominion and control of the land," and was "clearly the beneficial owner of the real property." OB 17-18 (quoting *Bays v. Haven*, 55 Wn. App. 324, 328, 777 P.2d 562 (1989)).

The Vogues raise a variety of challenges to the law as set forth above. None are well-taken. They are addressed below.

2. The *Arnold* line of cases includes denials of injunctions against subsequent purchasers.

The Vogues contend "the *Arnold* line of cases has always involved the party who first built the encroachment," "[t]he

Arnold court's choice of words merely reflects the facts of the cases it was considering," and injunctions against subsequent purchasers might still be appropriate. BR 18-19. In fact, *Arnold* itself considered a claim against subsequent purchasers. The encroachment was created by a Mr. Davison, who later sold to Mr. Brott, who later sold to the Arnolds. 75 Wn.2d at 144-45. When *Arnold* formulated its test and applied it to the facts before it, it declined to enjoin the Arnolds, the subsequent purchasers. Thus, "the *Arnold* line of cases" includes at least three cases, *Riley*, *White Water*, and *Arnold* itself, that refused to enjoin subsequent purchasers. Courts in other states have also declined to enter injunctions against subsequent purchasers. *See* OB 17 & n.2. And, as *Riley* noted, the plaintiffs before it did not "identify a single Washington case" that granted an injunction against a subsequent purchaser. 2020 WL 1696672 at *6.[1]

[1] The Vogues also contend this holding of *Riley* is "merely dicta" and that "the real reason" for the decision is that the purchasers acted in good faith by trying to resolve the encroachment issue before purchasing, allegedly in contrast to

3. Ms. Gillum had the right to possession; there was no encroachment before the tax foreclosure.

The Vogues do not challenge the law regarding the status of a contract purchaser as beneficial owner entitled to possession. *See Bays*, 55 Wn. App. at 328. Instead, they argue Ms. Gillum did not have a valid contract to purchase lot 3. BR 22-23. There are two flaws with this argument.

First, the parties stipulated that Ms. Gillum had an agreement to purchase lot 3. CP 12 ¶ 4. "Stipulated facts are generally binding on the parties and the court." *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 523, 940 P.2d 252 (1997); *see also* BR 3 (acknowledging Ms. Gillum "entered into an agreement with Howell to purchase Lot 3").

Second, an agreement to purchase real estate may be established by part performance as an alternative to satisfying the

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Ms. Gillum. BR 17. This argument misconstrues *Riley*. *See* 2020 WL 1696672 at *5-7. It also ignores the fact that there was no encroachment when Ms. Gillum moved in and the fact that she had no knowledge an encroachment had arisen until the Vogues sued her. RP 99-100.

statute of frauds. *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). Part performance may be established by showing "(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract." *Id.* The presence of two of these factors is usually sufficient to show part performance. *Id.* at 558. Here, Ms. Gillum satisfied all three. RP 26, 95-96, 108; CP 12 ¶ 4.[2] When she purchased lots 1 and 2 and the home, and agreed to purchase lot 3, she was entitled to move into the home and occupy the entire property. *See Bays*, 55 Wn. App. at 328. The Howells could have sought to cut off Ms. Gillum's rights, *see* RCW 61.30.020, but they chose not to disturb the status quo.

Thus, there was no encroachment until lot 3 was sold at the foreclosure sale. The trial court's findings and conclusions

[2] Because of the parties' stipulation and the fact the Vogues did not raise this issue at trial, Ms. Gillum need not have presented evidence of part performance, but the evidence presented did, in fact, establish her satisfaction of the part-performance test.

to the contrary are incorrect as a matter of law. *See* CP 23 ¶¶ 10, 12, 13; CP 24 ¶ 5.

4. Ms. Gillum's inability to complete the purchase of lot 3 was not in bad faith or otherwise wrongful.

The Vogues also contend that Ms. Gillum is guilty of wrongdoing in failing to keep up payments on the purchase of lot 3 and is, therefore, not entitled to equitable relief under the first *Proctor/Arnold* factor. The Vogues variously describe Ms. Gillum's default as "unclean hands," "bad faith," "willful," "indifferent," and taking a "calculated risk."

These arguments seek to divorce the terms in question from their context. As *Riley* explained, "the first *Arnold* element must be read in its entire context. . . . Read in its entirety, the first element applies to the party responsible for actively setting or establishing the encroachment." *Riley*, 2020 WL 1696672 at *6; *cf. State v. Flores*, 164 Wn.2d 1, 12, 186 P. 3d 1038 (2008) ("[T]o determine the meaning of a word in a series, a court should take into consideration the meaning naturally attaching to them from

the context, and . . . adopt the sense of the words which best harmonizes with the context.") (internal quotations omitted).[3] *Riley* understood that when *Arnold* articulated the first factor, it had in mind cases such as *Tyree*, which *Arnold* cited in the same sentence, in which the builder, "after being warned," "took a chance" by proceeding to build the encroaching building. *Arnold*, 75 Wn.2d at 150, 152; *see also Proctor*, 169 Wn.2d at 499 (In *Tyree*, "the encroachers had notice they might be building on another's land and took that risk."); *Riley*, 2020 WL 1696672 at *5-6 (discussing *Tyree* and *Bach*). And it understood that *Arnold* used the terms "calculated risk," "bad faith," "willfully," etc. to refer to those who build encroaching structures despite being warned they should not do so, not to subsequent purchasers. *Riley*, 2020 WL 1696672 at *5-6; *accord*

[3] The doctrine of *noscitur a sociis*, articulated in *Flores*, though most commonly applied to issues of statutory interpretation, is not limited to that arena. *See, e.g.*, *Ball v. Stokely Foods, Inc.*, 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950); *Meresse v. Stelma*, 100 Wn. App. 857, 866 n.10, 999 P.2d 1267 (2000).

White Water, 2015 WL 1453458 at *5-6 (rejecting "calculated risk" argument as to "a subsequent purchaser who was not responsible for constructing the encroaching structure"); *Hoffman v. Bob Law, Inc.*, 888 N.W.2d 569, 574 (S.D. 2016) (subsequent purchaser "was not acting in bad faith" regarding preexisting encroachment); *Pelosi v. Wailea Ranch Estates*, 985 P.2d 1045, 1056 (Haw. 1999) (subsequent purchasers "cannot be said to have performed deliberate or intentional acts" or "have intentionally taken a chance" with regard to preexisting structures) (internal quotations omitted); *Seid v. Ross*, 853 P.2d 308, 311 (Or. Ct. App. 1993) (suit against subsequent purchaser "is not a case where one party intentionally encroached on another's property"); *cf. JCRE Holdings, LLC v. GLK Land Trust*, 136 N.E.3d 202, 206 (Ill. App. Ct. 2019) (where encroaching structure was built with permission, "the encroachment was not intentional").

Even if the Vogues were permitted to extract the words on which they rely from their context, their argument would fail.

The argument ignores how the standards the Vogues invoke apply to circumstances such as Ms. Gillum's.

Despite her limited income, Ms. Gillum was able to purchase her home and lots 1 and 2, using insurance money from the death of her son, and to agree to purchase lot 3 over time, with payments from her husband's earnings. RP 90-91, 98-99, 109; CP 11 ¶ 3. Unfortunately, the husband became addicted to opioids, stopped providing money to complete the purchase, and eventually disappeared. RP 24, 97-98. Ms. Gillum did not fail to make the payments on the purchase agreement pursuant to any scheme or plan or due to any intent to cheat her sellers, the Howells. She simply could not afford to make the payments when she lost the support of her husband. RP 97. She had conversations with the Howells about her situation and the Howells chose not to pursue the matter. RP 99. The Howells also had agreed to pay the taxes, which they continued to pay, apparently until 2011. RP 97; OB 11 n.1. These facts, which the

Vogues do not contest, do not support any of the characterizations the Vogues seek to engraft onto them.

For example, "[a]n inability to pay is not evidence of bad faith." *Wynn v. Mo. Coordinating Bd. of Ed.* (*In re Wynn*), 270 B.R. 799, 804 (Bankr. S.D. Ga. 2001); *see also, e.g., Janaszak v. State*, 173 Wn. App. 703, 716, 297 P.3d 723 (2013) (negligent acts do not constitute bad faith); *First State Ins. Co. v. Kemper Nat'l. Ins. Co.*, 94 Wn. App. 602, 612, 971 P.2d 953 (1999) (A "party may fail to use ordinary care yet still not act in bad faith."); RCW 26.09.160(4) & RCW 26.18.050(4) (failure to pay support or maintenance due to inability to pay is not bad faith); *BAE Realty LLC v. Rosales*, 98 N.Y.S.3d 810, 813 n.3 (Civ. Ct. 2019) (tenant's inability to pay due to limited resources was not in bad faith). As one court put it: "Is being poor bad faith? Surely not." *Rutherford v. William D. Ford Direct Loan Program* (*In re Rutherford*), 317 B.R. 865, 880 (Bankr. N.D. Ala. 2004).

That bad faith is not a relevant concept here is also demonstrated by *Graham v. Jules Inv., Inc.*, which relied on

Arnold's reference to good faith as a factor. *Graham v. Jules Inv., Inc.*, 356 P.3d 986, 991 (Colo. App. 2014). In *Graham*, the structures in question had been built when all of the land in issue was under common ownership. *Id.* at 987-88. Only later did the defendant's predecessors lose part of the property to foreclosure. *Id.* at 988. In other words, there was no encroachment when the structures were built; the encroachment arose only when the plaintiffs' predecessors bought the portion of the property containing the structures at the foreclosure sale. Under these circumstances, the court held that the structures had been built, and the encroachment occurred, in good faith. *Id.* at 991.

Similarly here, lots 1-3 were under common ownership when the manufactured home was installed. In addition, Ms. Gillum was the legal owner of two of the lots and beneficial owner of the third lot, entitled to possession of all three, when she moved in in 1999. That she later lost lot 3 to foreclosure does not establish a lack of good faith on her part.

Nor does failing to make payments because of lack of funds constitute unclean hands. The unclean hands doctrine requires "willful misconduct." *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 73, 113 P.2d 845 (1941). A breach due to inability to pay does not meet that standard. *See, e.g., Hudesman v. Foley*, 4 Wn. App. 230, 234, 480 P.2d 534 (1971) (purchaser's financial inability to perform did not establish that purchaser had unclean hands); *Regional Transp. Auth. v. Burlington N., Inc.*, 426 N.E.2d 1143, 1148 (Ill. App. Ct. 1981) (breach due to inability to pay, rather than desire to default, does not constitute malicious intent or unclean hands).

The Vogues' argument that Ms. Gillum's default should be deemed to have occurred "willfully or indifferently," BR 12, 22, 23, ignores the fact that *Proctor* and *Arnold* specifically used those adjectives to describe the actions of those who "willfully or indifferently locate the encroaching structure," which Ms. Gillum did not do. *Proctor*, 169 Wn.2d at 500; *Arnold*, 75 Wn.2d at 152. In any event, a default due to inability to pay is not willful

or indifferent. *See, e.g., Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002) & RCW 10.01.180(3) (failure to pay fines, etc. due to inability to pay is not willful or intentional disobedience); *State ex rel. Foley v. Super. Ct.*, 57 Wn.2d 571, 574, 358 P.2d 550 (1961) (defaults due to fact that party was "ill, unable to work and had no income" were not due to "willful neglect, carelessness, or intentional delay").[4]

Similarly, a default caused by an inability to pay does not constitute a calculated risk. "'Calculated' means 'planned—for whatever reason or motive—to achieve the stated object. The conventional meaning of 'calculated' is 'devised with forethought.' Many courts, including this one, interpret 'calculated' as nearly synonymous with intentional." *U.S. v.*

[4] *See also Circle Mgmt., LLC v. Olivier*, 882 N.E.2d 129, 139-40 (Ill. App. Ct. 2007) (tenant's failure to make court-ordered payments was due to "inability to pay rather than wil[l]ful defiance"); *Pittman v. Lakeover Homeowners' Ass'n*, 909 So. 2d 1227, 1230 (Miss. 2005) (property owner's failure to complete construction of home because he could not afford to was not willful); *BAE Realty*, 98 N.Y.S.3d at 813 n.3 (tenant's inability to pay due to limited resources was not willful).

Siddiqui, 699 F.3d 690, 709 (2nd Cir. 2012) (internal citations and quotations omitted); *see also* Merriam-Webster Dictionary: Calculated Risk ("a hazard or chance of failure whose degree of probability has been reckoned or estimated before some undertaking is entered upon"), available at www.merriam-webster.com/dictionary/calculatedrisk. As used in *Arnold* and *Proctor*, the term refers to cases such as *Bach* and *Tyree*, in which parties were warned they should not build and made a conscious decision to build anyway. Ms. Gillum did not plan or intend to fail to complete the purchase of lot 3.

Ms. Gillum's inability to complete the purchase of lot 3 is not the equivalent of the conduct of the parties enjoined in the cases addressed in *Proctor*, *Arnold*, and *Riley*, parties who were warned that they were about to build an encroaching structure and proceeded despite that warning. *Arnold* and *Riley* correctly determined that, while injunctive relief was appropriate for such parties, it was not appropriate for subsequent purchasers who did not build the encroaching structure.

C. Ms. Gillum satisfied the second and third *Proctor/Arnold* factors

1. The relevant property is the Vogues' entire property.

As discussed in Ms. Gillum's opening brief, the law in Washington is that contiguous lots under common ownership are treated as a single property when the owner so treats the property. OB 21, 23-25.

As also discussed in the prior brief, the Vogues do intend to use lots 3-5 as a single property, relying on the septic field, well, electricity, driveway, and other improvements that already exist on lots 4 and 5. OB 21-23.

The Vogues do not challenge the cases discussed in Ms. Gillum's brief, including *Arnold*, establishing that contiguous lots should be treated as a single property when the owner so treats the property. Nor do the Vogues contest the fact that they intend to use lots 3-5 together as a single property.

Given this legal authority and these undisputed facts, the trial court erred as a matter of law when it held that whether the

damage to the Vogues was slight should be determined by considering lot 3 in isolation, not the entire property. *See* CP 24 ¶ 6; RP 172-73, 176. Such a "decision based on an erroneous view of the law necessarily constitutes an abuse of discretion." *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008).

The Vogues seek to frame the issue as whether there is substantial evidence to support the trial court's decision to look at lot 3 in isolation. BR 25-26. This is a non sequitur. Where, as here, the trial court applies the wrong legal standard, there cannot be substantial evidence supporting its decision.

If the Vogues mean to suggest there was substantial evidence that they do not intend to use the lots together as a single property, that argument must fail as well. The Vogues' intent is established by their own uncontradicted testimony and exhibits. RP 39-40, 78, 86, 161; Exs. 10, 79-84. There is no evidence to the contrary, and thus no substantial evidence to support a contrary conclusion.

2. The impact on the property as a whole is slight.

When the Vogues' property as a whole is considered, the impact of Ms. Gillum's home is slight. It represents 4.2% of the property's square footage and 8.1% of the property's value. OB 26. The Vogues' own building plan, Ex. 10, also demonstrates there is no real limitation on their ability to build a home in the future. There is ample room to build on lots 4 and 5, consistent with their original intent. RP 40.

The Vogues raise three arguments in opposition. First, the Vogues contend that lot 3 is unusable, resulting in the loss of one-third of their property, not merely 4.2%. BR 25-26. This argument relies on a red herring, the presence of Ms. Gillum's "fence, landscaping, and pathway" on lot 3. BR 25. When the Vogues first raised this new issue at trial, Ms. Gillum made clear that she was invoking *Proctor* and *Arnold* only with respect to her home, and not the other items. RP 165; *see also* OB 15. There is no objection to removal of the fence, flower bed, etc.. Thus, there is no *Proctor/Arnold* issue regarding the extent of

encroachment by, or the issuance of an injunction against, those items. The only issue presented is whether *Proctor* and *Arnold* dictate that Ms. Gillum's home should be preserved.[5]

Second, the Vogues contend that being able to build on lot 3 would permit more open space on lots 4 and 5. BR 26. But building on lots 4 and 5, per the Vogues' original plan, Ex. 10, would leave the same amount of open space as building on lot 3, save the 623 square feet, 4.2% of the property, on which Ms. Gillum's home sits. The size of the proposed home is limited by the septic permit; the Vogues could not build a larger home on lot 3 than on lots 4 and 5. RP 74; Ex. 10.

Finally, the Vogues say that building on lots 4 and 5 would deprive them of the work they have done to improve those lots.

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[5] This argument by the Vogues also relies on the presence of setbacks and alleged setbacks on lot 3. As previously noted, the alleged setback between lots 3 and 4 does not exist, given the Vogues' common ownership of those two lots. OB 24 (citing *Weld v. Bjork*, 75 Wn.2d 410, 412, 451 P.2d 675 (1969)). And the remaining setbacks would exist whether or not Ms. Gillum's home were present. Her home is not to blame for their presence.

BR 26. This new argument, not reflected in their trial testimony, ignores the fact that their original plan was to build on lots 4 and 5. RP 40, 74, 81-82; Ex. 10; BR 4.

3. The Vogues' infrequent use of the property demonstrates the harm to them is slight.

The extent of the landowner's use of the property is relevant to determining whether an encroachment's impact on that use is slight. OB 26-27 (citing *Proctor*, 169 Wn.2d at 503; *Arnold*, 75 Wn.2d at 145, 148, 152). In this case, there is no dispute that (1) the Vogues' property is vacant land (apart from a pump house and outhouse), (2) it is used by them only for recreational purposes, (3) it is 4.5 hours from their home, (4) they seldom visit it, and (5) many of their visits are very short. RP 70-71, 81, 87; CP 12-13 ¶¶ 11, 13, 14; Exs. 79-84. Though the Vogues have expressed a desire to build a small vacation home on the property "someday," they have indicated that is a long-term desire, not a short-term plan. CP 13 ¶ 15; RP 76, 81-82.[6]

[6] The Vogues stipulated that they "have considered building a vacation home in Ocean Park someday." CP 13 ¶ 15. Ms.

The Vogues' limited use of the property demonstrates that the impact of Ms. Gillum's home on them is slight. A person who visits their recreational property two to four times a year, often for two hours or less, is not impacted more than slightly by an encroachment on a small piece of the property.

The Vogues contend that whether an encroachment is slight should be viewed from the perspective of a hypothetical landowner of a single lot, not from the perspective of the actual landowner of multiple contiguous lots. BR 28-29. They cite no law in support of this argument. In fact, the argument is inconsistent with (1) the law set forth in Ms. Gillum's opening

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Vogue testified the Vogues' intent included "potentially to build a vacation home some day." RP 76. Mr. Vogue also testified that the notion of building a vacation home was "in the long run." RP 81-82; *see also* BR 4 (describing Vogues' hope to build "one day.") The Vogues' brief makes a fair point that the Vogues' testimony about the existence of a home "20, 30 years down the road," RP 59, 84, more likely was intended to refer to their use of the property, not to the time of building, but their other testimony and the stipulation indicate that building a vacation home is a goal for "someday" in "the long run," not the near term.

brief at 23-25, (2) the emphasis in *Proctor* and *Arnold* on examining the impact of the encroachment on "the landowner," *Proctor*, 169 Wn.2d at 500; *Arnold*, 75 Wn.2d at 152, i.e., the actual landowner, and (3) the fact that *Arnold* considered the combined lots of the actual landowner when it determined the encroachment in that case was slight. 75 Wn.2d at 144, 146.

The trial court erred when it declined to consider the Vogues' limited use of the property. This failure was an abuse of discretion. *See Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 221, 224, 995 P.2d 63 (2000).

D. The trial court abused its discretion by making inconsistent findings with respect to the fifth *Proctor/Arnold* factor.

The Vogues do not dispute the rule that internally inconsistent findings are untenable and constitute an abuse of discretion. OB 5, 31 (citing *State v. Stout*, 89 Wn. App. 118, 126, 948 P.2d 851 (1997)). Nor can there be any question that Finding of Fact 22, CP 24, and Conclusion of Law 9, CP 25, are internally inconsistent.

The Vogues, instead, contend that Finding of Fact 22 should be read as a clerical error, that Ms. Gillum clearly prevailed with respect to the "enormous disparity in resulting hardships" factor, and that there is nothing further to discuss with regard to the parties' respective hardships. BR 29-34. This argument is flawed for several reasons.

First, it is not evident that, when the trial court said "[t]he hardship to the defendant of losing her home ***is outweighed by*** the hardship to plaintiffs of not being able to use the property to build a home," it really meant "The hardship to the defendant of losing her home ***outweighs*** the hardship to plaintiffs of not being able to use the property to build a home." BR 30. Finding of Fact 22 does not read as a clerical error. If it was a mistake, it was a substantial one, much more than a typographical error.

Second, the import of the court's statement that the hardship to Ms. Gillum of losing her home is outweighed by the hardship to the Vogues is not limited to Finding of Fact 22. The statement reflects the trial court's overall improper weighing of

the factors. The nominal statement in Conclusion of Law 9 that Ms. Gillum prevailed with regard to the fifth factor stands in contrast not only to Finding of Fact 22 but also to the court's statement that it would not consider the parties' financial condition (i.e., the fact that Ms. Gillum would be rendered homeless by an injunction) or other property (i.e., the fact that the Vogues' Ocean Park property is recreational, not their primary residence) in evaluating the disparity of hardship. RP 177-78; CP 24 ¶ 21. Refusing to consider these facts meant the trial court gave insufficient weight to Ms. Gillum's hardship and excessive weight to the Vogues' hardship.

Indeed, despite their concession that Ms. Gillum prevailed on the fifth factor, the Vogues' arguments reflect the trial court's skewed balancing of the hardships. The Vogues say, for example, that no authority supports the proposition that the court should have treated "the recreational use of a property as of less value than a full-time residence." BR 27. It should be self-evident that loss of a primary residence, particularly a loss that

would leave the owner homeless, would inflict a greater hardship than a 4.2% limitation on the occasional use of recreational property. Nevertheless, the Vogues argue that "the trial court did not abuse its discretion in ordering [Ms. Gillum's] home removed, even if it renders her homeless." BR 33.

The trial court's inconsistent findings were an abuse of discretion. They also reflect its improper assessment of the disparity of hardships.

E. The Vogues' purchase of lot 3 with knowledge of the presence of Ms. Gillum's home weighs against issuance of an injunction.

The Vogues contend that "no binding authority" supports the proposition that a court may consider whether the plaintiff seeking the injunction "came to the encroachment." RB 35. In fact, multiple Washington cases have held that a court should consider whether a party seeking an injunction has contributed to the situation about which it complains. *See* OB 34 & n.6. *City of Benton City v. Adrian*, for example, held it was an abuse of discretion to grant an injunction without considering this factor.

City of Benton City v. Adrian, 50 Wn. App. 330, 339-40, 748 P.2d 679 (1988). In the specific context of encroachment cases, *White Water* and *Hanson v. Estell* denied injunctions, noting that the parties seeking the injunctions had known of the encroachments when they purchased. *White Water*, 2015 WL 1453458 at *7; *Hanson v. Estell*, 100 Wn. App. 281, 284, 997 P.2d 426 (2000). Cases from other states also have denied injunctions where the plaintiffs knew of the encroachment when they purchased. *See* OB 35 n.7.

Moreover, *Arnold* warned against an injunction "used as a weapon of oppression rather than in defense of a right. It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than by reason." 75 Wn.2d at 153.

In this case, the Vogues' conduct goes beyond merely purchasing with knowledge of Ms. Gillum's home. The Vogues measured the location of the home themselves and then checked listings of pending tax foreclosures, with the goal of buying lot 3

(without telling Ms. Gillum of the foreclosure), thereby creating the encroachment and an opportunity to eliminate Ms. Gillum's home. RP 75-76, 99-100. Their intent from the beginning was to attempt to use an injunction, an instrument of equity, "as a weapon of oppression." The trial court abused its discretion when it declined to consider this factor. *Kucera*, 140 Wn.2d at 221, 224; *Benton City*, 50 Wn. App. at 339-40.

F. Ms. Gillum satisfied all five *Proctor/Arnold* factors, though she was not required to do so.

1. Satisfaction of all five *Proctor/Arnold* factors is not required.

For the reasons discussed in Ms. Gillum's opening brief and above, Ms. Gillum satisfied all five *Proctor/Arnold* factors. In the course of challenging some of the factors, the Vogues have argued that satisfaction of all of the factors was required. Accordingly, this brief discusses that issue.

Proctor addressed the question whether all five factors must be satisfied. As framed by the dissent, "the *Arnold* test is, first and foremost, a gatekeeper. It is a checklist of five

requirements wherein ***each*** must be satisfied by clear and convincing evidence." *Proctor*, 169 Wn.2d at 505 (Sanders, J., dissenting) (emphasis in original).

The majority rejected this argument. *Id.* at 501-04. The court emphasized that the question whether to grant an injunction or, instead, apply the liability rule should be decided in a "flexible and fact-specific" manner, not according to a "hard and fast rule." *Id.* at 502-03; *see also id.* at 502 (equity is to be granted "in a meaningful manner," not "mechanically" or "blindly") (internal quotations omitted); *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 411, 341 P.2d 499 (1959) ("No one factor is controlling" in deciding whether to enjoin encroachment).

The trial court in this case understood that *Proctor* and *Arnold* do not require satisfaction of all five factors. After concluding (incorrectly) that Ms. Gillum had not satisfied the second factor, it stated that "the Court is not to make that a

determining factor." RP 173. Instead, it decided the case on the basis of "the weighing of all five of those factors." RP 178.

The Vogues rely on *Garcia v. Henley* for the proposition that the defendant must satisfy all five factors. *Garcia v. Henley*, 190 Wn.2d 539, 415 P.3d 241 (2018). The issue in *Garcia*, however, was "whether the trial court erred in compelling the sale of the Garcias' land without making findings of fact for each *Arnold* element." 190 Wn.2d at 544; *see also id.* at 542 ("Issue: Did the trial court err by failing to order ejectment of a trespassing structure without reasoning through the *Arnold* factors."). That is, the court held that the trial court must examine and make findings as to each of the factors, not that the defendant must satisfy each of the factors. Were the latter proposition true, it would be sufficient for the trial court to find that a defendant had not satisfied one factor; there would then be no need to examine the other four factors, as *Garcia* requires.

Assessment of the *Proctor/Arnold* factors is to be accomplished in a flexible manner. It is not required that a party satisfy all five factors.

2. Ms. Gillum satisfied the *Proctor/Arnold* factors. The trial court erred in granting injunctive relief.

In fact, Ms. Gillum did satisfy all of the *Proctor/Arnold* factors:

(1) As a subsequent purchaser, Ms. Gillum did not act improperly in locating the manufactured home, which had been in place for many years before she purchased it. Nor did an encroachment exist prior to the foreclosure sale. Nor was her default on the purchase agreement an improper act under *Proctor* and *Arnold*. The trial court erred as a matter of law in misinterpreting the law applicable to the first factor.

(2) & (3) The trial court also erred as a matter of law in determining that lot 3 should be viewed in isolation and in ignoring the Vogues' limited use of the property. The impact of Ms. Gillum's home on the square footage, the property value,

and the Vogues' use of the property is slight. The benefit of its removal would be small. And there is ample remaining room on the property for the Vogues to build a vacation home.

(4) The trial court determined that Ms. Gillum satisfied the fourth factor and the Vogues do not contest that determination. Implementation of the court's order would require the destruction of Ms. Gillum's home.

(5) Though the Vogues concede that Ms. Gillum satisfied the fifth factor, the trial court's inconsistent findings regarding this factor were an abuse of discretion. Coupled with the trial court's refusal to consider the relative significance of the loss of one's home versus a limitation on the use of vacation property, they reflect an improper weighing of the factors as a whole.

In addition, the Vogues' purchase of lot 3, with knowledge of the presence of Ms. Gillum's home, weighs against issuance of an injunction. The trial court abused its discretion when it declined to consider the Vogues' knowledge and plan to purchase the lot and then seek an injunction against Ms. Gillum.

As a result of the trial court's erroneous application of the law and its inappropriate weighing of the *Proctor/Arnold* factors, the grant of injunctive relief was manifestly unreasonable and an abuse of discretion. Whether viewed from the perspective of satisfaction of each factor or from the perspective of the overall weighing of the factors, the conclusion should be the same: the proper equitable result is to invoke the liability rule of *Proctor* and *Arnold*, not to require the destruction of Ms. Gillum's home, rendering her homeless.

II. CONCLUSION

Ms. Gillum satisfied the *Proctor/Arnold* factors. The trial court misapplied the law and abused its discretion in granting injunctive relief. Its judgment should be vacated, with directions to implement *Proctor* and *Arnold*'s liability rule in lieu of an injunction.

I hereby certify, pursuant to RAP 18.17, that this brief is produced using 14-point Times New Roman type, including footnotes, and that it contains 5849 words, not counting the exclusions specified in RAP 18.17(c), based on the word-count function of the computer used to prepare the brief.

RESPECTFULLY SUBMITTED this 9th day of September, 2021.

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I declare under penalty of perjury under the laws of the State of Washington that on this 9th day of September, 2021, I caused a true and correct copy of the REPLY BRIEF OF APPELLANT to be filed with the Court of Appeals, Division II, and to be served on the Attorneys of Record, via the Washington State Appellate Courts' Portal and first class mail addressed to following:

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